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Supreme Court of the United States.

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OCTOBER TERM, 1903

No. 73.

JAMES McLOUGHLIN,

Plaintiff in Error.

vs.

RAPHAEL TUCK & SONS' COMPANY, LIMITED,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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1903

Supreme Court of the United States.

JAMES McLOUGHLIN,
Plaintiff in Error,

against

RAPHAEL TUCK & SONS' COMPANY,
Limited,
Defendant in Error.

Oct. Term,
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No. 73.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought under U. S. R. S., Sec. 4963, as amended by Act of March 3, 1897, to recover the penalties therein prescribed for certain alleged impression by defendant of false notices of copyright upon certain picture books and for certain sales of books bearing such false notice since the passage of the Act.

The complaint contains eighty-three causes of action relating to eighty-three separate picture books. According to agreement and stipulation (Record, p. 3). the complaint is printed in condensed form, From the record it appears that as to the books in the first seventy causes of action the allegation is that the defendant "on or about the 1st day of August, 1896, * * * did publish and issue a certain picture book or booklet * * * * * * * and in and upon said book did knowingly insert and

impress a false and fictitious notice that the same was copyrighted, which notice was in the following words: 'Copyright 1896 by Raphael Tuck & Sons, Ltd.'" (Record, pp. 4-6.)

The seventieth, seventy-first and seventy-second causes of action, according to the record (Record, p. 6) state the same thing; but this is an error, as the original complaint alleged in the seventy-first and seventy-second causes of action that the issue and sale was on June 11, 1897, and did not charge defendant with inserting or impressing the notice. The record (p. 16) shows this fact, and plaintiff's counsel made the same assertion in his brief below. Defendant does not care to take any advantage of this mistake in the condensed complaint printed in the record.

The seventy-third to eighty-third causes of action allege only issue and sale by defendant on the 26th day of April, 1897 (Record, p. 7.)

The complaint alleges three offenses by the defendant:

1. Publishing,

2. Issuing; and

3. Impressing the false and fictitious notice of copyright.

The statute denounces but two offenses which the complaint can possibly cover:

1. Inserting or impressing the false notice of copyright.

2. Issuing or selling the book bearing such false notice.

Therefore the allegation as to publication is immaterial. Moreover, it is neither proved nor admitted.

The complaint does not allege sale by the defendant, unless issuing shall be deemed a sale.

Upon the trial of the action the defendant admitted (p. 15) as to the first seventy causes of action, that it had sold the books at the time alleged in the complaint, viz., August 1, 1896, with the notice of copyright impressed thereon. It also admitted that the said copyright notice was not true, that the books had not been copyrighted in this country, and that the copyright notice was false. It is also conceded "*for the purposes of the present trial of this cause of action, without prejudice to controverting it hereafter at any future time,*" that the notice was impressed upon said books under the authority of the defendant. Plaintiff's counsel (p. 15) also admitted that these books came from abroad in 1896; that is, before the amendment of March 3, 1897.

As to the seventy-first and seventy-second causes of action, defendant (p. 16) admitted that the two books were sold by it on June 11, 1897, as alleged in the complaint. Defendant's counsel, however, refused to admit that said two books were imported prior to March 3, 1897.

As to the seventy-third to eighty-third causes of action, defendant (p. 16) admitted sale on or about April 26, 1897, and admitted that the notice of copyright was false, and that it was impressed by the authority of the defendant. No admission as to the date of importation of these books was made by the plaintff.

The defendant then called Samuel Gabriel, the secretary and treasurer of the defendant company, who testified absolutely and distinctly and without qualification that all the books except No. 1742 (which constitutes the twenty-fifth cause of action) were imported into this country in 1896, and before the amendment of March 3, 1897 (Record, pp. 17–22).

Plaintiff's counsel attempted in every way to brow-beat and confuse the witness on this point and was repeatedly called to order by the court, and finally after the importation prior to 1897 was proved beyond the possibility of the shadow of a doubt, and after the court apparently became weary of trying to stop the brow-beating of the witness, plaintiff's counsel asked the following question (p. 23):

> "Q. Are you willing to swear of your own personal knowledge that those books were not brought into this country in 1897?"

to which the witness answered:

> "A. No, I will not swear."

Upon the strength of this one answer plaintiff's counsel asserted in his brief in the Circuit Court of Appeals that Mr. Gabriel had no knowledge of the facts and could not testify as to the importation of the books and refused to swear. The whole evidence of this witness is to the direct contrary and this answer at the best is merely the incautious answer of a witness badgered almost beyond endurance and convinced that the trial Judge was already satisfied of the fact that the books were actually imported prior to 1897.

As the brief for plaintiff in error has not yet been filed, we cannot know what it will contain; but in his brief in the Circuit Court of Appeals, counsel for plaintiff in error made several false or inaccurate statements. As these may very probably be repeated in this Court, we take this opportunity of answering them:

1. In his brief below counsel for plaintiff in error stated that the answer admits the *publication and* sale of the books complained of in the first seventy

causes of action (p. 9). This is false. The answer does not admit publication and admits sale only in the year 1896.

2. In his brief below counsel for plaintiff in error stated that defendant admitted that the books were sold *and published* by defendant at the times alleged in the complaint, with the statement of copyright thereon (p. 15.) This statement also is false. Defendant did not admit that the books were published by defendant either at the times alleged in the complaint or otherwise.

3. In his brief below counsel for plaintiff in error stated that Samuel Gabriel, secretary and treasurer of defendant, testified that he could not swear of his own personal knowledge that the books were not brought into this country in 1897 (p. 23). This statement also is essentially false. The testimony of Gabriel upon this point is as follows:

> "Q. You are familiar with the subject matter of this controversy and you have heard some of the admissions here? A. Yes, sir.
>
> Q. The admissions that were made just now are as follows: That the defendant sold a book known as No. 1750 and another known as No. 1754 on June 11, 1897. Will you please tell us when these two books were imported into the United States?
>
> *The Witness.*—Am I permitted to tell the story in my own way?
>
> *The Court.*—No; answer the question.
>
> Q. Those that you sold on the 11th of June, 1897, before what date, in what year, were they imported?

A. They must have been imported in 1896; there is one exception to that, No. 1742.

The Court.—You are asked about 1750 and 1754 : give careful attention to the question and only answer the question ; nobody asked you about 1742.

The Witness.—The books were imported in 1896.

Q. The books which I have referred to in my question ?

A. Yes, sir.

Q. Then, in order that we may understand you correctly, you wish to say that with the exception of a book or books, bearing the number 1742, all the other books that have been referred to in this litigation were imported in 1896; is that so ?

A. Yes, sir.

By the Court :

Q. Can you tell what time that book was sold ?

A. This particular book ?

Q. Yes.

A. No, sir.

Q. Can you tell whether or not it was imported prior to March 3, 1897 ?

A. Yes, sir; it was imported in 1896.

By Mr. Malcomson :

Q. How can you tell ?

A. Because none of the publications ordered in 1895, and imported in 1896, were brought here in 1897.

Q. How do you know that ?

A. In the first instance, because it is the

rule; in the second instance, I have taken trouble to examine that, and have gone into it very carefully.

Q. And have you personal knowledge in relation to that book?

A. I have.

Q. You have no personal knowledge of the actual entry or time of entry of those books which are before you now, have you?

A. Yes; I have personal knowledge that they were all imported during 1896.

Q. That all of those were?

A. All these books.

Q. The books were in your establishment in 1897, weren't they?

A. Possible some were there in 1897, but they were also there in 1896.

Q. But they were imported from time to time?

A. Not in 1897; there is no question about that.

Q. You cannot say when any one of those particular books were entered through the Custom House.

A. Except that they were entered in 1896.

Q. If you cannot say when any one of those individual books passed through the Custom House, how can you say, unless you passed every one of such books through the Custom House, when they were imported into this country?

A. By referring to the invoices; I have studied these invoices and found that during 1897 not one of the books in the complaint, 1742 excepted, arrived in this country.

(Pages 17–22, *passim.*)

The whole case, therefore, rests upon the pleadings, the admissions by the parties and the testimony of Samuel Gabriel. It will be noticed that there is no admission by the defendant that it *issued* or *published* any of the books complained of, nor is there any admission as to the *time* when the false notice of copyright was impressed upon said books by its authority. There is an admission that the false notice was impressed upon the books by the authority of the defendant at some unknown time, and that the defendant did sell books with such false notice at the times alleged in the complaint. Of course such sale was, in the language of the Statute, "knowingly."

The plaintiff, therefore, has under the Statute on its own contention, two causes of action against the defendant; one for inserting or impressing a false notice of copyright; the other for knowingly selling books bearing such false notice. As to the *selling* of the books complained of, the defendant is plainly relieved by the proviso at the end of U. S. R. S., Sec. 4963, which reads as follows:

> "Provided, That this Act shall not apply to any importation of or *sale* of such goods or articles brought into the United States prior to the passage thereof."

As to the first seventy causes of action, the complaint itself alleges such sale prior to the passage of the Act. As to the remaining causes of action, the testimony of Samuel Gabriel shows that all the books complained of, except No. 1742, were imported prior to the passage of the Act, and not subsequently. As to No. 1742, he testifies (p. 18), that this book was imported in May, 1897, but did not have the copyright notice on. Plaintiff's counsel objected to the testimony that this book lacked the copyright notice, but this objection is

without weight, and the fact is immaterial, since the complaint itself alleges in the twenty-fifth cause of action that this book was "issued" on or about August 1, 1896, before the passage of the Act, and the admission of plaintiff's counsel (p. 16) that this book was imported March 3, 1897, relieves the defendant.

As to the offence charged of inserting or impressing the false notice of copyright, we rely upon three points:

1. That the admission by the defendant as to the impressing of this notice by its authority is insufficient to sustain the complaint, for the reason that it does not admit any date when the notice was impressed, and that there is nothing in the record or the evidence to fix this date with any such certainty as is required by the law in actions of this kind.

2. That the action, being brought under the Statute as amended March 3, 1897, cannot cover acts committed prior to the passage of such amendment.

3. That the act was without the jurisdiction.

SUMMARY.

The first seventy causes of action charge two offenses: (1), impressing the false notice, and (2), selling the books bearing such notice. Under the admission of plaintiff's counsel (Rec., pp. 15–16) that these books were imported prior to the passage of the act, the proviso of the act applies, the second charge falls, and only the charge of impressing the false notice remains to be considered.

The remaining thirteen causes of action charge only one offense, viz.: knowingly issuing and sell-

ing the books bearing a false notice of copyright since the passage of the act as amended. The issuing is neither admitted nor proved. The sale is admitted. But the evidence of the witness Gabriel shows that all these books also were imported prior to the passage of the act, and the proviso of the act again applies, and these thirteen causes of action fail completely.

POINT I.

Plaintiff's own admission (Rec. pp. 15–16) **precludes recovery for defendant's sale of the books mentioned in the first seventy causes of action.**

(Proviso of Sec. 4963.)

POINT II.

The proof by the witness Gabriel precludes any recovery under the remaining thirteen causes of action.

(Proviso of Sec. 4963.)

POINT III.

The admission of proof that the book *1742* did not bear the copyright notice was not material error.

As to book *1742*, the witness Gabriel testifies (Rec. p. 18), that it was imported in May, 1897,

after the passage of the act as amended; but he also testifies (Rec. p. 18) that this book did not bear the copyright notice. When the witness reiterates this statement, plaintiff's counsel (p. 18) moves to strike out the testimony; but the motion comes too late, the question not having been objected to, and the witness (p. 18) having already given this testimony without objection.

Plaintiff's counsel argues at length in his brief below that the refusal of the Court to strike out the testimony, was material error because defendant's counsel had admitted (Rec., p. 16), that this book, among others, did bear the false notice of copyright. He overlooks entirely, however, the fact that, as this book *1742* is the subject of the twenty-fifth cause of action (Rec. p. 5), his own admission (Rec., p. 16), that the books mentioned in the first seventy causes of action were imported prior to March 3, 1897, covers this book *1742*, and that therefore no penalty for the sale of this book can be recovered. The testimony of the witness therefore, that it was imported in May, 1897, being subsequent and contrary to plaintiff's own admission, cannot be availed of by him, and if there was error it was immaterial as regards the seventy-seventh cause of action.

It is also immaterial as regards the twenty-fifth cause of action, because, even admitting that this book did bear the false notice of copyright, neither the twenty-fifth nor any of the first seventy causes of action has been proved. The charge of wrongful selling has already been disposed of, and the charge of wrongfully impressing the notice will be disposed of in Point IV.

POINT IV.

Plaintiff has not Proved His Right Under the Statute to Recover any Penalty for the Insertion or Impression by Defendant of any False Notice of Copyright upon the Books Mentioned in the First Seventy Causes of Action.

First.—Plaintiff has not proved that the false notice of copyright was inserted or impressed since the passage of the statute.

(1.) The defendant merely admits that the notice was false and was impressed upon these seventy books under the authority of the defendant. There is no admission as to the time when such notice was impressed, nor was any such admission asked or suggested (Rec. p. 15).

(2.) This is a penal action. The admission was dictated by the Court without suggestion of amendment by either party. No speculation, therefore, as to the possible intentions or concealed understandings of the parties is permissible, and the admission must be taken in the plain and obvious meaning of its terms. Neither publication nor issue of these books is proven.

(3.) Section 4963 was originally enacted July 8, 1870, and in its present amended form March 3, 1897. Before plaintiff can recover any penalties under this statute he must prove that the acts complained of were committed after the passage of the statute. This is elementary, and the statute itself shows that it is not retroactive, because it states that "Every

person who *shall* insert or impress" such false notice shall be liable. Plaintiff has failed to prove this or any facts from which the date of insertion or impression can be deduced.

(4.) If the notice "Copyright 1896" were true there might possibly be a presumption that it was inserted in the natural course of business and therefore in or since the year 1896. The fact and the admission, however, both are that the notice is false, and therefore no such presumption can be entertained.

(5.) If the purpose of impressing such notice were material, it might be reasonably presumed that the purpose was to make the public think the book had been copyrighted, and, therefore, the further presumption might possibly arise that such notice had been impressed after the date alleged for copyrighting. In these actions, however, the purpose of the defendant in impressing such notice is utterly immaterial, as the courts have repeatedly decided. No such presumption, therefore, can be drawn from any supposed purpose of the defendant.

There is nothing in this case which lays any foundation for fixing with reasonable certainty or any degree of probability the date when such notice was impressed. The proof fails to show such date, and is therefore not exclusive of a reasonable probability that such notice might have been impressed before the passage of the Act, when no offense would have been committed or penalty have accrued.

Second.—The impression of the notice was prior to the passage of the act under which suit is brought.

Although no date of impression is proven, yet the conclusion is inevitable that if the books bearing

this notice were actually sold on August 1, 1896, the notice must have been impressed prior to this time and prior to the passage of the act. This act says that "Every person who *shall* insert or impress such notice," etc., shall be liable. The act does not apply to past offences.

From plaintiff's brief in the Circuit Court of Appeals, we learned for the first time that plaintiff now claims that "The first seventy causes of action are for a violation of Section 4963, as it read before the amendment of March 3, 1897." This statement is false and the claim is inadmissible. The summons gives no notice of this, neither does the complaint; and the allegations of the complaint (Rec., p. 4) are absolutely inconsistent with such a supposition. The statute pleaded is necessarily the statute existing at the time the action is commenced unless otherwise expressly stated. The plaintiff has not pleaded two statutes. He has pleaded, urged and attempted to prove claims under the statute of March 3, 1897, and cannot be now allowed for the first time on the appeal to assert that his action was brought upon another statute. If the defendant had received the slightest intimation of such a claim, it would not have made, nor would the Court have asked it to make, the admission upon which alone these causes of action can be founded.

Third.—Recovery for the impression charged in the first seventy causes of action is barred by the limitation of Section 4968.

As the impression must have been prior to the sale, and the sale is alleged and proved as of August 1, 1896, the impression must have been more than two years before the commencement of the action. The Statute of Limitations was properly pleaded (Rec. p. 11.)

Fourth.—The proviso of Section 4963 covers the impression proved and relieves from the penalty.

Plaintiff argued at some length in his brief below that the offence of impressing the false notice was committed and completed only by the publication and issue of the books by defendant, at the City of New York, on August 1, 1896. Neither publication nor issue is proved or admitted, but plaintiff seems to assume that the sale admitted is such publication and issue.

If this position of plaintiff be correct, then it necessarily follows that the proviso of Section 4963 applies to the impression also; for, if the proviso forgives the sale, and the sale is necessary to the completion of the offense of impressing the notice, then this offense itself must also be forgiven. An essential part of the offense being destroyed, the offense can no longer exist.

Fifth.—The act as amended repealed the former act.

If the last position is correct, then the proviso of the act as amended forgives a wrongful insertion or impression of copyright notice prior to its passage, and the former act is therefore inconsistent with its provisions and repealed.

POINT V.

The action not being brought under the old statute, no penalty under that statute accrued, and Section 13 of the Revised Statutes does not apply.

POINT VI.

The amendment of March 3, 1897, repealed the former act, and bars any recovery thereunder.

POINT VII.

The insertion of the copyright notice in Germany, even if it were the act of the defendant, was committed beyond the jurisdiction and cannot be reached by the Statute.

(See opinon below, Rec. pp. 27-28.)

In this connection it should be remembered that the admission (Rec. p. 15) that the impression of the false copyright notice was by authority of the defendant, was dictated by the Court, and was only for the purposes of that trial and "without prejudice to controverting it hereafter at any future time."

The Court of Appeals, when it animadverts upon the conduct of the defendant, appears to have overlooked this fact.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

Dated November 10, 1903.

Respectfully submitted,

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Of Counsel for Defendant.